UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

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In the Matter of:

SEARS HOLDINGS CORPORATION,

Debtor.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

March 21, 2019

10:23 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: JUSTIN

HEARING re Notice of Agenda : Notice of Agenda of Matters Scheduled for Hearing on March 21, 2019 at 10:00 a.m. (document #2926)

HEARING re Motion to Compel Payment of Post-Petition Rent and Related Lease Obligations Pursuant to 11 U.S.C. §§ 105(a), 363(e), 365(d)(3) and 503(b)(l)(A) and to Pay All Subsequent Amounts Owed On a Timely Basis filed by Robert L. LeHane on behalf of Trustees of the Estate of Bernice Pauahi Bishop (document #2414)

HEARING re Objection of Transform Holdco, LLC (document #2832)

HEARING re Motion of Debtors for Order Shortening Notice with Respect to Motion of Debtors for Order (A) Enforcing Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compelling Turnover of Estate Property (related document(s)2796) (document #2798)

HEARING re Debtors Motion to (A) Enforce Asset Purchase Agreement and Automatic Stay Against Transform Holdco LLC and (B) Compel Turnover of Estate Property, and (II) Response to Transform Holdco LLCs Motion to Assign Matter to Mediation (related document(s)2766) (document #2796)

HEARING re Transform Holdco LLCs Motion to Assign Matter to Mediation, with Notice of Motion and Proposed Order (document #2766) Debtors' Response (document #2796)

HEARING re Official Committee of Unsecured Creditors Response (document #2808) (Response of Helen Andrews Inc., Mien Co., Ltd., Samii Solutions, Shanghai Fochier, Strong Progress garment Factory Company Ltd (document #2835)

HEARING re Notice of Rejection of Certain Unexpired Leases of Nonresidential Real Property and Abandonment of Property in Connection Therewith filed by Jacqueline Marcus on behalf of Sears Holdings Corporation (document #2695)

HEARING re Steel 1111, LLC's Limited Objection (document #2786) Debtors' Reply (document #2887)

HEARING re Motion to Compel the Debtor to (i) Disclose Status of Insurance Claim; (ii) Deposit Any Insurance Proceed Into Separate Account to be Used Exclusively to Repair the Insured Demised Premises; and (iii) Alternatively, Find the Automatic Stay Inapplicable to the Insurance Proceeds filed by Sonia E. Colon on behalf of Santa Rosa Mall, LLC. document # 1240)

HEARING re Debtors' Objection to Motion for Entry of Order Compelling Debtor to Disclose Status of Insurance Claim and Deposit Any Insurance Proceeds into Separate Account (Santa Rosa Mall, Puerto Rico) (related document(s)1240) (document #2512) Reply filed by Santa Rosa Mall, Puerto Rico (document #2828)

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P R O C E E D I N G S

THE CLERK: Please be seated.

THE COURT: Okay. Good morning. In re Sears Holdings Corporation, et al.

MR. SINGH: Good morning, Your Honor. Sunny Singh, Weil Gotshal, on behalf of the Debtors joined by my partners, Ray Schrock, Jared Friedman, and Paul Genender. Your Honor, we did file an amended agenda this morning that reflected another matter that had been resolved that was previously on the agenda. And so we are trying to narrow down what contested matters to report.

Your Honor, we also have before we get into the agenda an update on the plan process that I can walk Your Honor through as well as an update on the contested matter with Transform, that's on the agenda today. Before I get to that, just in the interest of efficiency, the first matter that's on the agenda is technically adjourned, but Mr. Lehane did want to make some remarks. Perhaps, I let him do that and then we can get into the other items for this morning.

THE COURT: I'm sorry. Maybe I don't have -- what I have the notice of second amended agenda.

MR. SINGH: Yes, Judge, that's the one --

THE COURT: But the first matter is this --

MR. SINGH: Uncontested Trustee of Estate of --

THE COURT: Okay. Fine. Bernice Bishop.

MR. SINGH: That's right.

THE COURT: I got it.

MR. SINGH: It's technically adjourned, but I think Mr. Lehane wanted to make some comments.

THE COURT: Okay. That's fine.

MR. SINGH: I'll let him just do that.

MR. LEHANE: Thank you very much, Mr. Singh. Good morning, Your Honor.

THE COURT: Good morning.

MR. LEHANE: Robert Lehane, Kelley Drye & Warren, on behalf of the Trustees of the Estate of Bernice Pauahi Bishop which does business as the Kamehameha Schools, owner of the Windward Mall in Kaneohe, Hawaii.

THE COURT: Okay.

MR. LEHANE: Your Honor, we appreciate that Sears and its counsel have worked with us to provide some interim adequate protection. Your Honor, the issue at hand is a significant shortfall in the rent. As of today, it's approximately $1.2 million.

We realize that this is a relatively minor amount in the scheme of the case, but the Trustees of this estate have a fiduciary duty to the Schools of Kamehameha to maximize the value of their real estate. And given the shortfall, we worked with Sears to try to get some adequate

protection.

What Sears has agreed to is to escrow $500,000 in the interim during this adjournment. We certainly appreciate that. We did want to just respond to the objection that had been filed by Transform Holdco which indicated that this was a premature attempt to force them to make a decision early. To the contrary, this significant issue was no news to Sears or ESL and what we would like to see is businesspeople focus on this issue.

The last thing that the Trustees of the estate want to do is to have to litigate issues of rent and cure inadequate assurance before Your Honor. And we hope that we can focus with businesspeople, with ESL Transform Holdco, and Sears to resolve these issues in advance of the April 12th deadline for them to make their decisions to assume or reject and/or a hearing on this on April 18th.

THE COURT: Okay. That's fine.

MR. LEHANE: We did receive proof of the $500,000 being escrowed.

THE COURT: Okay.

MR. LEHANE: Thank you very much, Your Honor.

THE COURT: Very well.

MR. SINGH: Thank you, Judge. And I can confirm we'll work with Mr. Lehane and his clients to try to get that resolved.

THE COURT: Okay.

MR. SINGH: So, Your Honor, just before I jump into the agenda just on the update on the plan process for the Court. And I'm sure the counsel for the Creditors Committee may want to be heard.

So, Your Honor, we've been working since we were last before you on the Chapter 11 plan, we have been meeting with the advisors for the Creditors Committee including most recently as of yesterday. We've also met with other constituents, including conferences with the PVGC, with Cyrus on plan-related issues.

A draft of the Chapter 11 plan has been circulated to the parties. They're reviewing including the Creditors Committee, and we're working through -- you know, we're awaiting comments on working through those issues with those parties.

Your Honor, the other update there is both the Debtors and the UCC have been very focused, as everyone frankly has been throughout these cases on administrative claims, and the diligence on those items is ongoing. It's not -- the work is not done yet, but that is the important focus of the parties.

Obviously, the disputes with ESL including the ones that are before you today will impact that analysis as one of the main reasons and we'll get into that during oral

argument that we're looking for expedited resolution of this dispute.

THE COURT: So let me just make -- so you have a team that's focusing on 503(b)(9) claims and on cure claims?

MR. SINGH: Yes, Judge. Well, cure claims are -- we're focused on them but that's --

THE COURT: They're two separate tasks. I didn't mean to lump them together.

MR. SINGH: Yes, exactly. Cure claims, the primary responsibility is really with Transform because they picked that up as part of the APA. We're obviously involved and working on those issues, and then we are primarily involved on the 503(b)(9). As Your Honor knows, you set the bar. I think that includes the 503(b)(9) claims to be asserted.

THE COURT: Right.

MR. SINGH: A review of those claims has already begun, at least the ones that are filing as they're coming in just sort of to at least, you know, clear out some of the (indiscernible), you know dupes, et cetera, and starting to look at the legal assertions there.

THE COURT: Okay. And is the committee comfortable with that process as it's unfolding?

MR. DIZENGOFF: Yeah.

THE COURT: I mean the 503(b)(9) process.

MR. DIZENGOFF: Yeah. Your Honor? I think you're done.

THE COURT: Go ahead.

MR. SINGH: Yeah.

MR. DIZENGOFF: Okay. So just a couple of comments to add.

THE COURT: If you can state your name for the record.

MR. DIZENGOFF: I'm sorry. Ira Dizengoff, Akin Gump Strauss, Hauer, & Feld on behalf of the Official Creditors Committee. So as Mr. Singh said, he's accurate. We're processing it. We have concerns about the admin claims, and that's another way -- that's reconciliation that's going to be ongoing. In addition to that from the Transform Holdco side and others in the capital structure, there's a deluge of 507(b) claims that also weigh on the ability for us to confirm the plan or pursue a plan.

These are serious issues that cause concern on our part. We're hopeful we can wade through that, and there's actually a pot of money that's left and we can actually pursue the plan. If not, we'll have to talk about what the alternatives might be. Our hope is that we can all get comfortable that this is something we can pursue and we can go down the path of a plan.

But the reconciliation, we met yesterday. We've

met a couple of times before. There's a lot of hard work that goes into it, but it's just premature because we don't have enough clarity yet to understand whether we have enough money to actually pay those claims.

THE COURT: Okay. And the 507(b) separate and apart from the 503(b)(9) --

MR. DIZENGOFF: Yeah.

THE COURT: -- are what other than professionals?

MR. DIZENGOFF: They're inadequate protection claims --

THE COURT: Okay.

MR. DIZENGOFF: -- that have been asserted -- I mean I don't have a dollar number yet.

THE COURT: All right. Oh, okay.

MR. DIZENGOFF: But they've been asserted.

THE COURT: So it's just the -- I've got it.

MR. DIZENGOFF: Yeah.

THE COURT: Thank you. Okay. So that should be a fairly closed universe, though, I would think.

MR. DIZENGOFF: It's a closed universe, but it's big numbers --

THE COURT: Yeah.

MR. DIZENGOFF: -- that have been alleged.

THE COURT: Right. Okay.

MR. SINGH: Your Honor, primarily that's as part

of the asset purchase agreement, there's the ESL. 507(b) became a part of it, which was, you know, the $50 million cap as Your Honor may recall --

THE COURT: Okay.

MR. SINGH: -- plus there's also Cyrus is another creditor who we've met with that has a 507(b) claim asserted.

THE COURT: Okay.

MR. SINGH: So, Your Honor, with that, just an update on where we are today unless you have any other questions on the plan process.

THE COURT: Well, the -- I saw the order submitted I think yesterday afternoon on the fee examiner.

MR. SINGH: Yes.

THE COURT: Since there were no objections, I gather the parties have agreed on the form of the order.

MR. SINGH: Yes, Your Honor. We have. And I think Mr. Schwartzberg is on the phone.

THE COURT: Okay.

MR. MORRISSEY: Actually, it's Richard Morrissey, Your Honor, for the U.S. Trustee. We're still tweaking the order a little bit just for clarification. But no one objected to the motion, and so we're working on final changes to the language.

THE COURT: All right. So I guess that should

delete what was submitted yesterday and just wait for the final version of that order?

MR. MORRISSEY: Yes, Your Honor.

THE COURT: Okay. That's fine. I just want to make one comment on that. Under the Bankruptcy Code, I guess this is a tautology, but professionals are entitled to be paid what they're owed under Section 330 of the Code. Fee examiners in a large case can serve a legitimate purpose in reviewing voluminous time entries both to catch almost inevitable typos, double entries, things like that which professionals obviously are not supposed to permit but in large applications, they creep in sometimes.

They're also worthwhile in detecting questionable entries or entries that aren't clear. And ultimately, in terms of judgment as to whether time should have been spent on some matter by a particular professional or not. I've never had a problem with any of that.

What I do have a problem with is if any examiner takes the position that, well, we just have to have X percent reduced. That, I think, is truly inappropriate. And if someone takes that position, it should be reported to me, okay. It may be that as part of resolving this case, parties will agree to cross reductions, but I don't know anyone should be strong-armed.

MR. SINGH: Thank you, Your Honor.

THE COURT: Okay.

MR. SINGH: Okay. So, Your Honor, with respect to -- moving on to the contested matters in the agenda, I do have an update for the Court that we did provide to chambers yesterday --

THE COURT: Okay.

MR. SINGH: -- of what is still open. We do have interim resolution on some of the issues. And so if I can just review those with the Court. So, Your Honor, with respect to the Debtor's motion to enforce the asset purchase agreement and automatic stay, there's really three issues that were remaining. It's the cash in transit, the prorated rent, as well as the credit card receivables issue that we've highlighted.

THE COURT: Right.

MR. SINGH: So, Your Honor, with respect to the cash in transit, we sought approximately $18.5 million. That number is moving. It's gone up a little bit. We did meet with Transform yesterday and did all agree that there would be some offsets there depending on checks that were cut by the estate for vendor payments pre-closing that cleared post-closing. So there does need to be a reconciliation.

And so what we've agreed, Your Honor, for the time being is that Transform will transfer $3 million in

respective cash in transit by Tuesday, March 26th. They will also provide us the data and supporting documentation so we can reconcile those amounts and any offsets. And then hopefully by April 3rd, Your Honor, Transform will then agree to pay any amounts that are in dispute that we owed an excess of the three million. Of course, all parties' rights are reserved should we not be able to agree on that.

THE COURT: Okay. So an important part of that was that transparency on the data which I guess clearly the Debtors were complaining about?

MR. SINGH: Yes. And so that's why that's part of the resolution. They've agreed to provide it to us by no later than Tuesday so we can take a look at that and hopefully within the next week or so but again no later than April 3rd, come to some agreement --

THE COURT: Okay.

MR. SINGH: -- amongst the parties on what else is owed.

THE COURT: Okay.

MR. SINGH: Your Honor, in addition, there's the next issue is the pro ration issue pursuant to Section 9.11 of the APA. The Debtors in their motion request $16.2 million which reflects the pro-rated post-close rent for the month of February 2019. Transform has asserted that there's offsets on that pro ration against that amount that need to

be reconciled. So what we've agreed is that Transform will transfer $5 million in respect of the pro ration again by Tuesday, March 26th, and they will also produce by that time the data, the backup documents so that parties can reconcile that amount.

And, again by April 3rd, Transform will then transfer any excess that's agreed to be owed in respect to the pro ration. And of course, all parties' rights being reserved if we can't come to an agreement on those issues.

THE COURT: Okay.

MR. SINGH: Your Honor, so that really just leaves open for today two issues. One is in the Debtor's motion to enforce as to credit card receivables argument that we have with Transform. And, Your Honor, we think that's just an issue of contract interpretation that my partner Jared Friedman will address with the Court and that Transform's motion to compel mediation which is also on for today and going forward.

THE COURT: Okay.

MR. SINGH: So, Your Honor, unless you have any questions, just one housekeeping matter before I turn the podium over to Mr. Friedman. We did file -- the Debtors did file a motion to shorten notice with respect to the motion to enforce. It did not prejudice any parties because we gave the allotted seven days to respond. We did file our

reply yesterday, but technically, Your Honor, we do have an order pending with respect to that.

THE COURT: Okay. Well, I'll grant that motion, but in so granting it, that shouldn't be construed as a ruling on whether the motion should be treated as an adversary proceeding --

MR. SINGH: Certainly, Your Honor.

THE COURT: -- or not or that an adversary proceeding be required or not.

MR. SINGH: Certainly, Your Honor. Thank you.

THE COURT: Okay.

MR. SINGH: So, Your Honor, I'm going to turn the podium over to Mr. Friedman to address the remaining portions of the motion to enforce for today.

THE COURT: Okay.

MR. FRIEDMAN: Good morning, Your Honor. Jared Friedman from Weil Gotshal on behalf of Debtors.

THE COURT: Good morning.

MR. FRIEDMAN: I'm going to address you this morning, this $14.6 million credit card receivable from pre-closing transactions that we assert belongs to Debtors under the APA and that we assert has been held by Transform Co in violation of the automatic stay, the sale order, and they're without basis under the APA.

The buyer argues that the Debtors are not entitled

to this $14.6 million pre-closing transaction credit card proceeds because Debtors included $35 million of credit card receivables that are currently held by credit card processors in these so-called reserve accounts in what we delivered to the buyer at closing.

Now, there is no dispute that these reserve accounts that were delivered at closing are made up of funds that were collected by the credit card processor from individuals shopping at Sears stores, buying inventory from Sears, using their credit card to pay for those, for that inventory. Monies then went over to the credit card processor which was then owed to at the time Sears as the Debtors.

Under the APA, credit card receivables are defined as one of the definitions in 1.1. as, "Each account or payment, intangible" -- each as defined in the UCC, "together with all income, payments, and proceeds thereof" -- and here's the key, "owed by a credit card payment processor or issuer of credit cards to a seller resulting from charges by a customer of the seller on credit cards processed by such processor."

THE COURT: In the ordinary course.

MR. FRIEDMAN: In the ordinary course, exactly. So the agreements in the ordinary course do in fact allow under certain circumstances for these credit card

receivables to be held back for some period of time. But when they're held back, that doesn't in any way mean that they're no longer owed to the seller, to the Debtors in this case. And, again, as I said, there's no dispute that that's how these "reserve funds" Were funded through these credit card receivables.

The buyer's argument is that rather than these being credit card receivables, once the decision is made to hold them back, suddenly they're no longer credit card receivables. Instead, they're something else. And the question is under the APA, is there some provision that suggests that there's something else?

Now, certainly, if in the definition we just looked at of credit card accounts receivable, it said it's these types of credit card receivables that come in when the purchase is made at the Sears store, provided however, if there's a holdback, it no longer is a credit card accounts receivable. That language, of course, is not in the APA. That's not what was negotiated.

Instead, Transform is arguing that we should look to Section 2.10 of the APA which defines a bunch of specific types of other security. It's got security deposits, letters of credit, escrow deposits, letters of credit, a whole bunch of things that these receivables clearly are not. It also has some catch-all language like "other

assets." Well, other assets can be virtually everything from, you know, the pencils on the desks to anything else.

THE COURT: Can we go through this language --

MR. FRIEDMAN: Sure.

THE COURT: -- a little more specifically in 2.1?

MR. FRIEDMAN: So 2.10, Your Honor --

THE COURT: It says these are parts of the assets that are being transferred, is that correct?

MR. FRIEDMAN: Correct.

THE COURT: "Any and all rights of sellers even to any restricted cash, security deposits, letters of credit, escrow deposits, and cash collateral, including cash collateral given to obtain or maintain letters of credit and cash drawn or paid on letters of credit, utility deposits, performance payment or surety bonds, credits allowance, prepaid rent, or other assets, charges, setoffs, prepaid expenses, other prepaid items, and other security, collectively security deposits."

So I'm assuming that the buyer contends that these funds in the so-called reserve accounts or on reserve are either restricted cash, escrow deposit, or cash collateral?

MR. FRIEDMAN: I think their argument was --

THE COURT: And what is your response to that?

MR. FRIEDMAN: I don't think it's any of those. And I think that their argument really is largely that it's

other assets are just security general, that they're focusing instead on these general terms and saying that the -- I don't know there's any doubt that before there was a determination to hold back these funds, that they were credit card receivables. They clearly fall in that definition. The question is did something happen the moment that the credit card processor said we're not going to distribute them in three days. Instead, as we're permitted to under the agreement, we're going to hold back and wait to distribute these until you demonstrate further creditworthiness to us.

THE COURT: You meaning who, the buyer or Sears?

MR. FRIEDMAN: This is all pre-closing.

THE COURT: Oh, so this was --

MR. FRIEDMAN: So at this point it's Sears and Debtors.

THE COURT: So this is Sears. So one of my problems in resolving this issue today, is that the declaration that the buyer has provided in support of its contractual position, that quotes from and refers to the credit card agreements that was provided to chambers until late yesterday afternoon, was redacted and the agreements were not attached. So the reason I got on the bench today late was I was trying to parse through the motion to seal, which under my chambers rules includes the requirement to

provide the unredacted agreements.

But no one is really focused on those actual provisions except yesterday afternoon, to some extent, but the contention, I believe, is that those provisions constitute a security agreement that actually gives the credit card issuers the right to withhold the money and treat it as collateral. But the record is really pretty sketchy on that as far as today is concerned.

MR. FRIEDMANN: And Your Honor, we would suggest that because the terms of the APA itself are not ambiguous, that declaration and all of its redacted documents really are parol evidence --

THE COURT: Well, but --

MR. FRIEDMANN: --that need to be looked at --

THE COURT: This is not to interpret the agreement in the sense that someone is trying to tell me what this paragraph means. I can read what the paragraph means, and both sides agree that under Delaware law that I apply the plain meaning rule. I view this agreement as setting forth some specific terms, the ones I mentioned, that might fit; i.e., restricted cash, escrow deposits and cash collateral.

And then it has a general phrase or other assets and other security. So I view it as basically collateral. That's how it's defined, security deposits, referring to collateral. And I would be looking at the credit card

agreements to see if they create that type of relationship. I don't think you all dispute, for example, but if you posted collateral to secure a reimbursement obligation under a letter of credit, that that would be transferred to the buyer subject to the cap and the reallocation mechanism.

MR. FRIEDMANN: A hundred percent, that's right, Your Honor.

THE COURT: So --

MR. FRIEDMANN: The point here is, though, that that's not what happened and what did happen --

THE COURT: No, but --

MR. FRIEDMANN: -- is not in dispute.

THE COURT: But it seems to me that the underlying credit card agreements that govern this, to me, very amorphous concept of a reserve is central to that. I mean, I can read a -- as you all have and there's no dispute over it -- a pledge of cash to secure a letter of credit, reimbursement obligation. I can review a cash collateral agreement to secure whatever, you know, some performance obligation related to collecting on the cash.

But similarly, I need to, I think, make sure I have all of these agreements and give you all a chance to comment on them before I rule on what they actually create. And I'll just note that just focusing on the largest one this morning and how it was characterized in the -- I think

it's pronounced Hede, H-E-D-E, declaration?

MR. FRIEDMANN: Yes.

THE COURT: It seemed to be somewhat mischaracterized. It refers to a right to create a letter of credit as a condition, which the Debtors didn't do, but then it refers elsewhere to, we're just going to pull money back, but I don't know if they have a right to do that. It's just not clear to me.

MR. FRIEDMANN: Okay. I think our -- the point we're trying to make this morning, Your Honor, is that 2.10 is a general provision in the agreement --

THE COURT: Right.

MR. FRIEDMANN: -- to cover a whole bunch of things that would've been transferred. Here, we're not dealing with something that has to fall under 2.10 because we have very specific funds that are detailed, frankly in excruciating detail, when that definition of credit card accounts receivable was drafted talking about specifically these types of funds, that these are the types of funds that are owed to the Debtor, which they still are owed.

These still were owed at the time of the closing, these are still funds that were owed to the Debtor, resulting from charges from a customer or seller and there's nothing in the provision in the definition of credit card accounts to say, well, that suggests that at some point, if

it's moved from one account to another or if there's some operation of contract that doesn't allow it to be distributed right away, that that any way takes away from them being credit card accounts receivable.

They still meet this definition to a tee, which is why we suggested you don't need to get into figuring out whether or not there's something in those agreements that allows them to squeeze this under the definition of 2.10. We don't need to go there. We've got a clear definition.

THE COURT: Well, what if you had complied -- well, I guess they would've gotten a letter of credit for someone else, so I guess that doesn't work. But what if you had actually agreed and entered into a cash collateral agreement with a credit card issuer, which is certainly conceivable to me, that we will secure your payment -- any refunds that we owe you down the road with the cash collateral?

MR. FRIEDMANN: And I think the point here --

THE COURT: Then you have -- these two provisions are conflicting with each other, aren't they? Because this says any and all.

MR. FRIEDMANN: Well, you have a --

THE COURT: When I say "this," I mean --

MR. FRIEDMANN: -- general catch-all --

THE COURT: -- 2.10.

MR. FRIEDMANN: Right. You have a general catch-all provision conflicting with a very specific provision and rule of contract construct interpretation require us to give credence to the specific definition that these clearly fall under rather than being concerned that, well, it also could fall under some general catch-all, because things always fall under general catch-alls.

In this circumstance, the parties negotiated a specific definition of credit card receivables and did not include any type of provision that suggested that credit card accounts receivable stop becoming credit card account receivables at any point.

THE COURT: Except, perhaps, in 2.10.

MR. FRIEDMANN: But that's not -- they could have written that. That could've been negotiated. They could have said, provided, however, in the event that any of these credit card account receivables are retained or are held back or are put into a reserve account, then they become security as defined in 2.10. We're hearing -- that's a novel argument being made now that it falls under there, but that's not what the parties negotiated and that's not what's reflected in the plain language of the APA.

You have to read between the lines to suggest that there is that link, that when this became -- when these credit card account receivables were put into a reserve

account, then suddenly they get shifted over to fall under 2.10. That's nowhere in this agreement.

THE COURT: What is your interpretation of the last clause in the definition of credit cards accounts receivable --

MR. FRIEDMANN: I assume you're referring to the in each case --

THE COURT: -- in 101?

MR. FRIEDMANN: -- in the ordinary course of business?

THE COURT: Right. Exactly. In each case, in the ordinary course of its business.

MR. FRIEDMANN: Our interpretation of that is that the -- to the extent that these credit card accounts receivable were not being paid out immediately or within three days or four days, whatever it happens to be under the particular agreement, they were being retained for some period of time, a longer period of time, pursuant to that agreement in the ordinary course of business, as defined by the parties in that agreement. They anticipated --

THE COURT: Couldn't that cover the reserve cash, then, because it's not being paid out every three days?

MR. FRIEDMANN: I'm sorry.

THE COURT: Wouldn't that cover the reserved cash, the reserved amount, because it's not being paid out every

three days? Or is it a wheel of cash where it's paid out every three days and there's a new reserve every three days?

MR. FRIEDMANN: My understanding -- and I'm not an expert on these agreements, either -- is that there are different provisions of the different agreements in terms of how things are paid out and there's always some funds reserved because you can have people who -- the same person who bought a lawn mower one week on a credit card comes to return it the next week and all of a sudden, there needs to be money to pay back a customer.

THE COURT: Don't we have to go through the agreements, then, to see how it's in the ordinary course or not in the ordinary course?

MR. FRIEDMANN: I don't know that we do, because no matter what, there's still credit card accounts receivable. They always are --

THE COURT: No, but then it has this -- this has this clause at the clause at the end, in each case in the ordinary course of business.

MR. FRIEDMANN: There's no -- but the thing is, the buyer here is not suggesting that outside of the ordinary course of business these receivables were used for some type of security. To the extent that they're --

THE COURT: I don't know. I think that's what they are suggesting, is that these credit card companies

sent noticed to Sears and said we're going to reserve the money. Or somebody.

MR. FRIEDMANN: Under the terms of their agreements that they -- in the ordinary course, they were permitted to do this, not --

THE COURT: No, but that -- see, again, I got -- I don't know if I have all the agreements, A. B, I got them yesterday afternoon after I was in this room with a 300-item, 65-page agenda with about 250 Chapter 13 Debtors, and then I went off to teach my law school class. So I had a little bit of time this morning to look over the agreements and the language in at least some of the agreements seemed to be conflicting with the buyer's interpretation of them and I'm just not ready to rule on it.

It just seems to me that either side could be right at this point on what those agreements mean and how they fit into these two definitional provisions. I'm not talking about taking parol evidence or anything like that. I'm just seeing how the contract with the credit card issuers fit into this language.

MR. FRIEDMANN: And, Your Honor, I'm not an expert on these agreements yet, either, because I got them around the same time you did.

THE COURT: Okay.

MR. FRIEDMANN: If it would be helpful to the

Court -- obviously we're not suggesting that we think there's anything in these agreements that change the meaning of the APA or that any way change the fact that we believe that we're entitled to this $14.6 million, if it would be helpful to the Court for the parties to separately brief for you the --

THE COURT: Well, I just --

MR. FRIEDMANN: -- APA part of those agreements --

THE COURT: I want to make sure I have --

MR. FRIEDMANN: -- we'd be happy to do that.

THE COURT: I'm sorry to talk over you. I'd just like to get a full set and make sure I have a full set and I don't know if I need more briefing. It may be that I just want -- need to hear you all again.

MR. FRIEDMANN: No, I --

THE COURT: Then maybe when people focus on them, they'll see an answer here, too, which is quite possible.

MR. FRIEDMANN: We'd be happy to do either. Thank you, Your Honor.

THE COURT: Okay. I mean, among other things, your argument that the specific governs over the general here, is made more clearly now than in the papers and neither I nor my clerks went through and looked at this agreement to see whether that's really how this agreement works. Now I'm talking about the APA. I mean, that's usually the case but

these two -- I mean, one provision says any, so that's why the ordinary course language, I think, is important in the other one because I'm not sure how specific it really is, given that language.

Now, you may say that what the card payment processers have done here in respect of these so-called reserves, which I don't think they actually -- well, I didn't get through all three of the agreements. But the first one doesn't actually use the reserve term, I think.

MR. FRIEDMANN: That's correct.

THE COURT: So I don't know whether this is out of the ordinary course or on -- and here's another issue. The definition means owed, right? So even if the credit card company is acting outside of its rights and just holding it, I would assume it's owed because they're not acting within their rights. But maybe they are acting within their rights, and if they are, maybe it's ordinary course, in which case maybe you are owed the money.

MR. FRIEDMANN: Yeah, I don't see any way in which we're not owed the money, whether --

THE COURT: Well, I know you don't, but --

MR. FRIEDMANN: -- security. What I'm saying, the money -- it's not like the get to keep the money.

THE COURT: No, but -- I'm sorry. Owed the money by the buyer.

MR. FRIEDMANN: Right.

THE COURT: Not by the credit card --

MR. FRIEDMANN: Yeah.

THE COURT: You definitely are owed the money some day by the credit card company.

MR. FRIEDMANN: And that's our --

THE COURT: As anyone who posts a security deposit is owed money --

MR. FRIEDMANN: Right.

THE COURT: -- eventually, unless they do the thing that the deposit secures. Which, by the way, these agreements, at least the one I read most carefully, the one where the most money is owed, doesn't really say what it secures.

It just says we're going to hold it. Maybe there's some other provision that says, oh, this is -- we're securing X, whatever that is. The declaration says it's securing refunds, you know, the obligation of Sears to refund money that, I guess at some point, gets refunded in these relationships. But anyway, just to me, I'm just not ready to rule on that issue.

MR. FRIEDMAN: Thank you. We're happy to come back and -- once we've all (indiscernible) these agreements and address the questions for you.

THE COURT: All right. I'm happy to hear from the

buyer too. But I haven't addressed the one issue that the buyer weighs in addition to the merits, which is the applicability of Rule 7001 here, which states that, in 7001.1, a proceeding to recover money or property other than a proceeding to compel the debtor to delivery property to the trustee, is to be dealt with in an adversary proceeding. Many courts have held that that rule applies to turnover actions. Even though the rule doesn't say turnover, turnover includes recovering, arguably, money.

On the other hand, neither side has cited this case, but to me it appears to be controlling. The Second Circuit, in Weber, W-E-B-E-R v. SEFCU, In re Weber, 719 F3rd 72, Second Circuit 2013, well after the promulgation of Rule 7001, says that where a party is violating the automatic stay under 362(a)(3), by withholding property of the estate, a debtor does not have to go through an adversary proceeding to recover it. You may have to go through an adversary proceeding to obtain damages for breach of the automatic stay, but you don't have to go through an adversary proceeding.

The Court goes even further. That some additional act by the debtor is required before the creditor is obligated to surrender the property is not the case. That's actually the majority view, but it doesn't really matter, it's the Second Circuit's view.

Now, there is no dispute in that case that the car was the debtor's property. But other courts have put a gloss on it, and the Second Circuit quotes the Eight Circuit in saying, "If persons who could make ...," and here's the key phrase, "... no substantial adverse claim to a debtor's property in their possession, could without cost to themselves, compel the debtor or his trustee to bring suit as a prerequisite to returning the property. The powers of a bankruptcy court to collect the estate for the benefit of creditors would be vastly reduced," and, therefore, we're going to require it. So, no substantial adverse claim.

I can't imagine that you wouldn't have a gloss like that because, obviously, to the extent there is a substantial adverse claim, I can't imagine that you wouldn't have a gloss like that because, obviously, to the extent there is a substantial adverse claim the party may be taking the risk, who's making that claim, that they're in violation of the stay and may ultimately be liable for substantial damages caused by violating the stay. But at some point, if there is a substantial adverse claim, you need to determine that claim in the context of an adversary proceeding. You're saying there's no, this is a no-brainer: there's no substantial adverse claim. That may be the case.

Even if there were a substantial adverse claim, I don't think that the Second Circuit would say, even if you

did have to have an adversary proceeding, that you're relieved from breaching the automatic stay. And that's important, and I think the buyer should understand this. That means that, in addition, if it loses here, ultimately, in addition to which paying over the money, it may well be liable on top of that for breaking the automatic stay, including for your cost in enforcing the stay and any other consequential damages. That's the important thing to keep in mind. It may make sense, therefore, to return the money to the debtor recognizing that it's not going to be used until this issue is determined one way or the other.

MR. FRIEDMAN: Thank you, Your Honor.

MR. LIMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. LIMAN: Lewis Liman from Clearly Gottlieb for Transform. Let me, again, (indiscernible) the procedural points. And obviously, will take into mind Your Honor's words at the very end. With respect to the procedural point, the point that we had tried to make in our papers was that with respect to the motion to turn over, that was subject to Rule 7001. We did not cite the Second Circuit case. I was not aware of the Second Circuit case, but --

THE COURT: You guys don't deal with people with cars, that's why.

MR. LIMAN: We did, Your Honor, take the position

that, as the Second Circuit said, that if there was a substantial claim there would be an evidentiary hearing required.

THE COURT: That's fair.

MR. LIMAN: And that is what the series of cases, frankly, that the Debtors cite with respect to violations to the automatic stay. They're all cases --

THE COURT: They just say there's no substantial claim, that it's clear from the face of the documents.

MR. LIMAN: Your Honor, as you know, this is one of a series of claims that we've got against the Debtor. I can go through those in a moment, but from our perspective, we've got a $13.7 million claim against the Debtor arising from this issue.

THE COURT: But set off violates the automatic stay too, so you can't say that we're not paying what you owe because we're owed money too. That's a violation of the stay also.

MR. LIMAN: I understand that Your Honor. And that's not what we're doing.

THE COURT: Well, it sounded like what you were just telling me, so I just wanted to make clear you understood that.

MR. LIMAN: It's not what we're doing. What I was trying to say, Your Honor, was that the issue that arises to

Your Honor with respect to credit card reserves, can cut depending on how Your Honor decides it in favor of the Debtors or can cut in favor of the buyers, depending on how Your Honor resolves that issue. I want to make just a couple of points with respect to --

THE COURT: But again -- I'm sorry to interrupt you but I really want to make sure you all understand this. If you all lose that issue you will clearly have violated the automatic stay, and unlike one circuit, which I think now is reconsidering it in a subsequent ruling, good faith is not a defense to violation of the automatic stay. It may be a defense to punitive damages -- it is, probably, a defense to punitive damages -- but not to consequential damages. So, you may end up paying the cost of litigating this not only for your client, but the Debtors, and any direct damages that result from it if you lose.

MR. LIMAN: Your Honor, I have an apology to make which is with respect to the declarations that were submitted yesterday. As Your Honor knows, we informed the Court, we have to give notice to the credit card companies. This matter proceeded on an expedited basis.

THE COURT: I understand. That's fine.

MR. LIMAN: We tried to get them to Your Honor as quickly as possible.

THE COURT: That's fine.

MR. LIMAN: I want to just make a couple of points with respect to law and to, frankly, sit down with respect to this issue because I think we can give you briefing on it if Your Honor desires. We agree that the relevant question is the character of this amorphous concept called reserves in the hands of the Debtor at the moment of the closing. That is the relevant question: What is it, what was the character at the time that it was being sold?

We also agree that the contract distinguishes between accounts payable and security. From our perspective, just to answer Your Honor's question, these reserves could fit within a number of different categories under 2.1(o) including cash collateral, and including security; including, frankly, prepaid items, any number of different ideas.

THE COURT: Is there a security agreement?

MR. LIMAN: There's not a formal security agreement. Your Honor has the agreements in front of you. They do make clear that the funds that were on deposit with the card companies were to protect them against default. That's the language with respect to --

THE COURT: It would be useful to get a sense from the parties as to whether this would count as collateral under applicable law. It didn't bleep out at me when I skimmed the agreement. It looked like they may have just

had contract rights to withhold money.

MR. LIMAN: Your Honor, under the --

THE COURT: I'm not sure they even had that.

MR. LIMAN: Under the accelerated briefing process we were under, as we pointed out in our papers, we did not have an opportunity to put in all of the different arguments.

THE COURT: That's right. I appreciate that.

MR. LIMAN: I do think it's important to address the issues raised with respect to whether these were owed, whether they were in the ordinary course, and whether they were owed in respect of credit card payments, because I think, frankly, the evidence that the Debtors have submitted makes it quite clear that at the moment of closing, they were not owed, number one.

THE COURT: Where does the moment of closing come in? I mean if they're owed in the ordinary course -- I don't know how this works, but if it's just a rule of cash, it may fit into the definition.

MR. LIMAN: Well, Your Honor, if these are a sum of moneys that are held, that are constantly being replenished, that sum of money, the millions of dollars is not money that the Debtor had a right to obtain when it closed, and frankly, under the terms of agreement, was not clear whether the Debtor would ever be able to recover those

moneys. They were also not owed in the ordinary course. And if they were returned it would not be as a result of the credit card charges, but as a result of satisfying the various trigger conditions.

THE COURT: They're in the credit card -- the trigger conditions, you mean in the credit card agreement?

MR. LIMAN: Correct, Your Honor. The card companies had a right to hold onto these moneys until those trigger conditions, financial conditions were satisfied or until, frankly, we stopped charging with accepting American Express cards or Discover cards, or the like.

THE COURT: I guess that -- I understand the parties' respective positions, I just don't know whether that's the case. And you could read this to say they are owed, they're just not payable until, in the ordinary course they become payable. But again, you all have been reasonably clear at laying out your arguments. I just can't decide it today because I don't know the relationship based on the agreements with the credit card companies.

MR. LIMAN: I do think it is important just to read the contract as a whole, and in context.

THE COURT: You're talking about the APA now?

MR. LIMAN: I am, not the credit card agreements, which we gave you. And I think reading them in context and as a whole, the function of 10.9 is very clearly to provide

the collateral necessary to support the ABL. That's why 10.9 is part of the conditions of closing. There are other provisions within the contract that refer to certain amounts.

THE COURT: I love that argument. Of course, that's not in the agreement itself, but I did have a question. When you say the collateral necessary to support the ABL, what do you mean by that?

MR. LIMAN: Your Honor, one of the items that the parties discussed leading up to the presentation of the APA to you for approval was whether they transform the buyer after it purchased the assets would be able to have the financing in place to continue to run the business. That in fact was a condition of closing of the -- that the buyer had to satisfy.

In connection with that, the buyer needed a certain amount of collateral that the banks would accept. That was the function of 10.9.

THE COURT: Walk me through that. 2.10 provides for the transfer of cash that's securing obligations of Sears.

MR. LIMAN: In connection with the contracts that are acquired.

THE COURT: Right. So that's already been pledged to someone else. So I don't see how that fits into 10.9.

How can you say that that collateral that someone else has a lien on becomes the buyer's asset to pledge to its lender?

MR. LIMAN: Your Honor, that's exactly one-hundred percent the point.

THE COURT: Okay.

MR. LIMAN: That is the point. Cash that is on deposit, however it's funded, with a counterparty, a credit card company --

THE COURT: Right.

MR. LIMAN: -- to provide protection against the risk of default cannot be used as collateral with the banks. Has no value to the banks. Collateral to the credit card companies can't be collateral to the banks. And it is for that reason, Your Honor, that the items that are in 10.9 of the defined items specified as pharmacy receivables, ordered inventory, and accounts -- credit card accounts receivables. The reserves in the parol evidence is quite clear, and it's frankly probably not even parol evidence.

THE COURT: So you're saying that the definition credit card receivables is just used in 10.9?

MR. LIMAN: It's used in two places. It's used in 2.1 -- maybe three places. 2.1(d) gives the seller the right to the accounts receivable. It defines accounts receivable to include, among other things, credit card receivables. 1.1 defines credit card accounts receivables.

10.9, which is the collateral provision, picks up those items in 2.1 that can be used as collateral with the ABL banks. It picks up the credit card accounts receivables, the pharmacy receivables, but it does not pick up cash collateral, prepaid items, security deposits, other security.

THE COURT: So let me understand your argument. You're saying that those would be assets that stay with the seller, but they don't fit into the allocation mechanism in 10.9?

MR. LIMAN: No, not -- I don't think that's quite my argument. My argument is that there are two categories of items under 2.1, two relevant categories under 2.1 that the buyer purchased. The buyer purchased the cash collateral, the security deposits, the security, and the prepaid items and restricted cash in connection with the contracts and other acquired assets that it was assuming. That's what is in 2.10.

THE COURT: Right.

MR. LIMAN: Under 2.1(d), we purchased a separate category of items. And that refers, among other things, to all acquired receivables. If you're looking for what acquired receivables are, go to 1.1. And acquired receivables are defined to include the credit card accounts receivables, the pharmacy receivables, and the warranty

receivables.

THE COURT: Right. So you would buy those.

MR. LIMAN: We'd buy all of those (indiscernible).

THE COURT: And then 10.9 has this crediting mechanism if it's above the billion six.

MR. LIMAN: 10.9 gives us the minimum amount of the -- of certain of the acquired receivables and the inventory, that which is necessary to satisfy the ABL.

THE COURT: Okay, I understand it now. All right. I thought somehow you were arguing that -- I understand it now.

MR. LIMAN: If I was arguing the other thing, I may have been arguing incorrectly.

THE COURT: I misunderstood.

MR. LIMAN: Your Honor, with respect to the process from here, we do have some thoughts with respect to that. We've given you I think the relevant contracts. We can make sure we've given you all of the relevant contracts. We do think that there is some relevant evidence, both with respect to the meaning of the contract to the extent that there is any ambiguity. For our perspective, we think the contract is clear and there is no ambiguity and that we'd win. But we think that there is relevant parol evidence, powerful parol evidence that the seller until the last minute also understood that the reserves were not credit

card accounts receivable.

THE COURT: I don't think we should get into that until I conclude that there is an ambiguity.

MR. LIMAN: And so we would be prepared, and Your Honor knows we had suggested this item for mediation. Thinking about the Court's schedule, frankly, as a large creditor ourselves of the estate, thinking about minimizing expenses. But we're prepared to proceed whatever way the Court would like us to proceed and to give you the evidence and to give you further briefing with respect to some of these definitional items.

THE COURT: Let me ask, what is the -- this I more for the Debtors. What is the Debtor's immediate need or timing need for this money?

MR. SINGH: Your Honor, Sunny Singh on behalf of the Debtors. This issue really goes to the plan and all of the disputes with respect to ESL because they're going to affect -- as Your Honor will recall, there's sort of the amounts that the assumed liabilities go to ESL and all of the disputes that are being raised are going to affect what Mr. Dizengoff (indiscernible) presenting to court earlier about the administrative claims solvency analysis and the plan process. So that's why, Your Honor, this speedy resolution and why we think mediation doesn't make a lot of sense. The issues are before Your Honor. You know, I think

the only thing left now with this dispute is to give you the agreements and address those issues. And that's really what it comes down to. We don't think it makes sense to brief --

THE COURT: That's a separate --

MR. SINGH: Yeah.

THE COURT: Right now we're just talking about a little under $15 million.

MR. SINGH: That's right, Judge.

THE COURT: Is the Debtor's receipt of $15 million within the next week, you know, King Richard III, for whatever nail --

MR. SINGH: No, no, no. It's not as if we don't get the $15 million, we've got a serious problem.

THE COURT: Okay, all right.

MR. SINGH: There is cash. You know, there's the wind-down account that has close to $90 million. But there is -- that issue is not -- it's not an immediate one-week issue, but it goes to the larger plan issues.

THE COURT: Right. But there are all these other disputes that --

MR. SINGH: That all go --

THE COURT: -- that it appears the parties are focused on and --

MR. SINGH: That's fair. That's correct.

THE COURT: -- resolve in, you know, at least now

a transparent way.

MR. SINGH: That's correct.

THE COURT: Okay. Let me say two things. First, I really think the buyer would be well-advised to turn the money over to the Debtor so it's not violating the automatic stay. And then agreeing on some sort of adequate protection mechanism so that it won't be lost in case it wins.

Secondly, I've given you all I think a fair amount to think about, at least to how I'm thinking about it. I doubt that's anything more than a mediator would tell you. And I think you should go and look at the contracts and the points I've been raising with you and see if you can't resolve this.

I am going to be out most of the first week of April. So I could give you a hearing date, you know, next Thursday or probably the second week of April. And that would be a hearing I would expect you all would have -- or maybe wait until the April 18th date. But I would think that hearing would clearly focus on the plain meaning of the agreements and the context of the -- with the context of the credit card agreements. And perhaps, although it would only be this much a designated factual issue, if there is one. But I think one can go with the plain meaning of the contract here. So I'm skeptical that we would need any evidence.

So just to repeat then, my inclination, unless -- and what Mr. Singh told me suggests the opposite. Unless this -- you know, getting this money in and spending it is critical for the Debtors, I recommend you put this on for the 18th and brief it by the 11th and try to resolve it with some of the -- paying attention to some of the ways I would be -- I think I've given you a pretty good signal on how I would be looking at these issues.

MR. SINGH: Your honor, we're fine with April 18th.

THE COURT: Okay. And again, I would strongly advise the buyer to turn the money over so that they aren't in violation of the stay.

MR. LIMAN: Yeah, I think the concern on our part is you identified as the adequate protection.

THE COURT: Well, you can -- that's what the Second Circuit said.

MR. SINGH: Your Honor, we can ask --

THE COURT: You can request for that. You can request that. You know, but --

MR. SINGH: We'd be happy to stipulate to (indiscernible).

MR. LIMAN: We may have to have a discussion about that.

Your Honor, would you like me to address the

motion to mediate or --

THE COURT: Look, I think you're doing a pretty good job of resolving it on your own, all these issues. The one thing that concerned me was the suggestion, frankly, that both parties were making, although the Debtor was making it more strongly, that the process -- the information process was not as transparent as it needed to be. A mediator couldn't mediate without that same transparency anyway. So I'm telling you to be transparent on the reconciliation process and anything else that's affecting these issues. And you all have a contract. Just live up to it, both sides. I think it's too early for a mediation, in other words.

On the other hand, if either party of the contract believes that someone is hiding the ball, they should let me know right away, and I'll stop that.

MR. LIMAN: Your Honor, our concern had been that we sent a letter identifying the contract issues, and it was unanswered for ten days, which is the reason why with -- in this circumstance we're --

THE COURT: It seems like the parties are pretty well focused on these things at this point. And maybe people are waiting for reconciliation documents before they answer it. So I think the parties are well represented here. And it's probably more productive to go as far as you

all can on these issues. And if there's some dispute that you can't resolve, then I'll decide whether it should be mediated or I should just decide it.

MR. LIMAN: Just in the interest of transparency, we do have rather substantial monetary claims against the estate for breaches of the APA and ways in which we believe that we were substantially shortchanged.

THE COURT: Those are probably the ones I should decide. I mean, you know.

MR. LIMAN: And those may -- if we can't resolve those through discussions, they may need to be initiated by some form of contested proceeding with -- permitting Your Honor to decide the --

THE COURT: That's fine. I've done that before, as Mr. Dizengoff may remember with Carl Icahn and others.

MR. LIMAN: Quite happy to have Your Honor do that if we are not able to reach resolution. Thank you, Your Honor.

THE COURT: Thanks. So I'm not going to -- I'm just going to carry the mediation motion. I think the issues to be mediated have morphed just in the time since it was filed. So I'm not denying it, I'm just going to carry it. And if a party thinks that one or more issues should be brought to my attention as to whether they should be mediated or not, you are free to do that.

MR. SINGH: Thank you, Judge. Your Honor, I think that -- Sunny Singh for the Debtors. I think that actually leads to item number five on the agenda.

THE COURT: Which is what?

MR. SINGH: Which is a notice of rejection that Debtors filed --

THE COURT: Oh, okay. I thought you were talking about mediation still.

MR. SINGH: Oh, no, no, no. I'm sorry, Judge. I'm sorry. No, mediation -- now that Your Honor has carried the mediation, we're up to item five, which is our notice of rejection to --

THE COURT: Can I just say one more thing about the procedure here? I mean, it's well-established, and I hate to note this because I have the greatest respect for the people that do the bankruptcy rules, including Judge Bernstein, who is on the committee and has been for a long time. But it's well established that if there is a conflict between the code and the rules, the code governs. And, you know, the Second Circuit has spoken on that issue as far as the adversary proceeding points. So I feel comfortable dealing with the issues that we just now ended for today through this process.

Okay, I'm sorry. So go back to item five.

MR. SINGH: Yeah. I'm going to actually turn --

we do have one objection, a limited objection, by Steel 1111 that's pending. And I'm going to turn the podium over to my colleague, Candace Arthur, to address this in the next motion, Your Honor.

MS. ARTHUR: Good morning, Your Honor. For the record, Candace Arthur, Weil, Gotshal & Manges on behalf of Sears Holdings Corporation and its affiliated debtors.

Your Honor, as Mr. Singh noted, the item before the Court today is with respect to our lease rejection notice that we filed on February 26th, 2019. Specifically it is relates to Store 1004, located at 1111 Franklin Avenue in Garden City, New York.

The Debtors determined, Your Honor, in their business judgement, that the lease was not necessary or beneficial to the Debtor's businesses. Further, we determined that there is no current opportunity to assume an assignment lease, and (indiscernible) value will be realized by any such transaction.

The landlord did file a limited objection to lease rejection notice, and that was filed on March 8th, ECF 2786. I'd like to note that Paragraph 8 of the objection does state that the landlord has no objection to the Debtor's rejection of the lease in and of itself as an exercise of the Debtor's business judgement.

Accordingly, Your Honor, we are here before you

today solely with respect to the rejection date. As you may recall from the hearing that we had in November in connection with another similarly-situated landlord, the rejection order that we would propose to submit only provides a proposed rejection date that the Debtors are setting forth, and the actual rejection date is not fixed. As a result, the landlord would be able to contest the Debtor's rejection date to the extent that it determined it still wanted to do so.

You know, that being said, Your Honor, the landlord of the lease premises has moved before the court requesting that the rejection of the lease be effective to an unknown time in the future when a third-party licensee ceases to occupy certain parking spaces of the property. We respectfully request that the court deny the landlord's request. Winthrop licensee is the licensee of the property. And I would like to note for your court that the Debtors did not actually notice Winthrop in connection with the lease rejection notice, although Winthrop is aware of the Debtor's decision with respect to the property due to communications with Winthrop. They were not served the lease rejection notice itself.

THE COURT: Who wasn't served with it?

MS. ARTHUR: The licensee, Winthrop. Winthrop Hospital, yes.

THE COURT: The hospital that's using the parking lot.

MS. ARTHUR: Yes. Your Honor, the way that we view the objection and the lease itself is that we comply with lease rejection procedures. We notify the landlord that we do not want this property anymore. They are able to come in and they can re-let the premises.

We unequivocally sent a surrender notice to the landlord doing the same, providing the lockbox information. And at this point and this juncture, any postponement of the effective date of rejection of the lease will compel the Debtors to compensate the landlord for property it's not using. It will be at the Debtor's estate's expense, and it's for a delay that the Debtors made every effort to avoid. And it would force the Debtors to potentially incur unnecessary administrative expenses.

This Court has held numerous times that the appropriate rejection date is the date in which a debtor surrenders possession and tell a landlord that it can let the premises. That is what we did in this case. This court has also noted in its prior matters, specifically A&P, that post-rejection it would be the landlord's burden to evict a subtenant that happens to be remaining on the premises. And not to parse between subtenant versus licensee, but, Your Honor, we do believe that our rejection of the lease does in

fact take away any rights that Winthrop would have to remain on the premises to the extent that they still desire to do so.

The landlord is free to negotiate with Winthrop to the extent that they would like to keep Winthrop on and enter into a separate agreement with Winthrop as well.

But, you know, as stated in our papers, we are of the position that equity weighs in favor of the Debtors and dismissing the landlords, what we would consider a grab for administrative priority payments based upon a third party's use of parking spaces. I would --

THE COURT: So what was the agreement between the Debtor and Winthrop?

MS. ARTHUR: That we would allow them to use 550 parking spaces.

THE COURT: Okay. And that was a lease agreement or --

MS. ARTHUR: It was a license agreement.

THE COURT: It was made with a license. But it was to use land?

MS. ARTHUR: It was, Your Honor.

THE COURT: Okay. Was there any attornment or acknowledgement by the landlord of that agreement?

MS. ARTHUR: Your Honor, I'm not aware of whether or not there was an attornment agreement. I do know --

THE COURT: I mean, did they give any rights to -- did the landlord give any rights, separate -- do we know whether the landlord gave any rights to Winthrop?

MS. ARTHUR: We do not know if Steel 1111, the current landlord, if they did so. We do know that the Winthrop license agreement was in place before Steel, as successor landlord, took possession of the property. So we do believe that they were aware of Winthrop's existence and aware of the license agreement, but there wasn't a formal attornment agreement that I'm -- I can present to the Court today.

THE COURT: Okay. Is counsel for Steel here?

CLERK: Yes.

THE COURT: Okay.

MR. STEIN: Good morning, Your Honor. For the record, Matthew Stein, Kasowitz, Benson, Torres on behalf of Steel 1111.

Just to set the factual predicate here. I think there are four facts that make this a little -- this case a little unique from most of these disputes that are before Your Honor. One, Sears is still holding itself out to be -- holding it out -- holding itself out to Winthrop as the sublandlord, or as the licensor. Steel -- Sears is still collecting rent and it's still benefiting from the possession of the premises.

THE COURT: How is -- is that acknowledged?

MR. STEIN: That was something that we put in our papers that was not responded to in the reply brief.

MS. ARTHUR: Your Honor, we are aware that the Winthrop did inadvertently deposit it's March rent into an account that the (indiscernible) actually has control of at the moment. Of course we fully intend to turn over any amount that Winthrop did in fact put into the account (indiscernible) and we will work with (indiscernible). We have no intention of keeping the funds.

THE COURT: Okay.

MR. STEIN: Second, I don't think it was inadvertent because there's no privity between Steel and the licensee. The license agreement is strictly between Sears and Winthrop and Winthrop would have no reason to pay those numbers directly to --

THE COURT: Well, there's no attornment agreement or any acknowledgement of the subtenancy?

MR. STEIN: I know that Steel is aware that Winthrop is in -- is occupying these 550 parking spaces, but I'm not aware of any formal acknowledgement where Steel would have the same rights as the licensor while -- as part of that license agreement.

THE COURT: Okay. So the landlord could evict them?

MR. STEIN: I'm not -- the landlord -- look, I acknowledge that. And I was before Your Honor in A&P and that rejection of the overlease results in the termination of a sublease or a sublicense. But let me get to the third issue as to why that's a problem.

The Debtors provided no notice of its rejection of the prime lease to Winthrop. And counsel noted that Winthrop is aware, but I've seen no indication how Winthrop was made aware, or even in fact that Winthrop was aware. I think that leads to why the fact that Winthrop paid the March rent to Sears.

THE COURT: Does it matter?

MR. STEIN: I think it does.

THE COURT: I mean, what standing would they have to object?

MR. STEIN: What standing would Winthrop have?

THE COURT: Yeah.

MR. STEIN: I think they were a proper noticed party under the procedures order that Your Honor entered.

THE COURT: But there --

MR. STEIN: Well, but here's the problem. The problem is that Your Honor enters an order that Winthrop did not have the ability to come here and contest. It could collaterally attack that order if we go to enforce eviction rights in state court.

THE COURT: What --

MR. STEIN: So I think --

THE COURT: I'm sorry. Let's assume for the moment that instead of rejecting the lease the sublandlord tenant materially breached the lease, right, their subtenant under New York law doesn't have the right to hold the primary landlord in place because it didn't get notice of the breach.

I mean, the Second Circuit just ruled, two days ago, that parties that don't have an economic interest in the relief that's being sought don't have standing to contest it. And that -- they've held that repeatedly. I just don't see where the subtenant would have standing here. What -- it's obvious that the answer to any objection they raised would be this is solely between the landlord and the tenant.

MR. STEIN: I think, though, that the Debtors' procedures orders provided that any party affected would --

THE COURT: Directly affected. They're not directly --

MR. STEIN: They are directly affected --

THE COURT: No, because they --

MR. STEIN: - because it results in the termination of the license.

THE COURT: Shareholders are directly affected,

too, when they're wiped out. But if they have no equity then they don't have standing. The Second Circuit --

MR. STEIN: We have --

THE COURT: -- has held that repeatedly. If a debtor has no equity in property, an individual debtor, they can't contest the sale of the property, even if they're living in it. So the words "directly affected" is important, when it says directly.

MR. STEIN: I don't have the specific language in front of me, so I --

THE COURT: Anyway, they haven't complained.

MR. STEIN: Winthrop hasn't complained because I'm sure they got -- they received as to that their subject -- that their license has automatically terminated.

THE COURT: Well, I was just told that they did have notice.

MR. STEIN: I'm -- I haven't seen any proof of that. It's -- they certainly were not listed as a noticed party on the affidavit of service of the notice of rejection where the Debtor said they were -- they would give notice to all parties.

THE COURT: Okay.

MS. ARTHUR: Your Honor, as I noted, to the extent that Sears has any of the -- any rent that Winthrop may have deposited into this account, we fully intend to turn over.

It's a New York lease, New York license agreement as well. I think Your Honor correctly noted the law as it -- with respect to the treatment of leases in New York. Additionally, you know, this is a dark store, it went through the GOB process. It's not a secret as to what Sears intends to do with respect to that property and as it relates to Winthrop specifically.

In fact, you know, Winthrop's using the parking spaces. The landlord sent us a correspondence with a laundry list of maintenance-related requests that they want to do, including, you know, snow removal and all these other things that Sears would have been -- that Sears was handling in connection with the property. So to, you know, to paint the picture that Winthrop is in any way in the dark as to the proceedings and as to Sears' intention with the property, I don't think that's true.

THE COURT: I thought you told me that they were aware of it now?

MS. ARTHUR: Not formally. We didn't serve a formal notice, Your Honor, but --

THE COURT: No, but I thought you said they were aware.

MS. ARTHUR: They were -- yes, they are aware of Sears' position with respect to the property and they rejecting the lease that Sears has with Steel 1111.

THE COURT: Okay. Has the landlord made any effort to evict Winthrop?

MR. STEIN: Not yet, Your Honor.

THE COURT: Okay. Has it given it any notice?

MR. STEIN: I don't believe any communications have occurred. I know that the communications to date have resolved around Steel maintaining the garage, which under the license agreement had been Sears' responsibility. I know that Steel has been working directly with Winthrop to make sure that those conditions are resolved. But no notice has been made -- no notice -- Steel has not notified Winthrop of the rejection notice that was sent to Steel by the Debtors.

THE COURT: Okay. Okay. Oh, there is one -- the motion says that the Debtor hasn't turned over the keys. Are there keys, as opposed to an access code and a lockbox?

MR. STEIN: There was a lockbox. And it came to my attention, after we filed the objection, that notice was provided to one individual at Steel. Notice was not provided, though, to the notice parties in the underlying lease agreement, but notice was provided to a Steel employee.

THE COURT: Okay. But Steel has the codes and --

MR. STEIN: Steel has the codes now. Yes, sir.

THE COURT: Okay. All right. Okay. Thanks.

Okay. I have before me an objection by Steel. You can sit down. You don't have to --

MS. ARTHUR: Thank you.

THE COURT: Steel 1111, LLC to the Debtors, notice of rejection of the lease for Store Number 1004 which is located in Garden City, New York. The basis for the objection is with respect to the rejection date in the notice of rejection as would then be incorporated in the order, which derives from the terms of the order, which is providing the date rejection date be the date under the November 16, 2018 order by which the Court established these rejection procedures and provided therein for the rejection date under how to procedures to be the date when the Debtor surrenders the property, by providing notice of such surrender and the turnover of, as applicable, keys, codes or lockbox entry information.

It appears to be acknowledged today that in fact Sears did that on February 26th, 2019, which is the rejection date under this rejection notice and the order. And that's memorialized in an email that's attached to the Debtors' response to the limited objection by Steel 1111.

The other basis for the objection is that I should not treat the lease as rejected as of that date, notwithstanding the lease procedures and the order proposed in compliance with those lease procedures, because a

subtenant or licensee, Winthrop Hospital, continues to use a portion of the parking lot for the shopping center, notwithstanding the rejection of the head lease with Steel 1111.

The former landlord contends that, in essence, the burden of delivering an effective surrender of the property includes the Debtor obtaining the eviction of the subtenant hospital.

I disagree with that argument. The case law, I believe, is clear in the Southern District of New York and in the Second Circuit, generally, that the rejection of a lease and the Debtors' required compliance with Section 365(d)(4) of the bankruptcy code, which requires that the Debtor in Possession, in respect of a rejected lease, "shall immediately surrender that nonresidential real property to the lessor," means that upon rejection and a surrender, as laid out in the rejection procedures, the sublandlord, in this case Sears, has no remaining ongoing obligations to the head landlord. And, moreover, the termination -- I'm sorry, the rejection of the lease results in the termination of ongoing responsibilities to the subtenant.

And I discussed this issue at length in In Re: The Great Atlantic & Pacific Tea Company in 544 B.R. 43 (Bankr. S.D.N.Y., 2016). See also Subculture, LLC v. Rogers Investments, In Re: Culture Project, 571 B.R. 555, 559

(Bankr. S.D.N.Y., 2017), where that Court stated that, "a subtenant may have rights under nonbankruptcy law following a rejection of the main lease, either through agreements with the landlord or by operation of state law, but that section 365(h) itself does not provide the subtenant with a possessory right following a rejection of the prime lease." That has long been the holding, as I said, in the Southern District and elsewhere in the circuit. See In Re: Child World, Inc. 142 B.R. 87, 89 (Bankr. S.D.N.Y., 1992). "When a prime lease fails so does the sublease." In Re: Dial-A-Tire, Inc., 78 B.R. 13, 16 (Bankr. W.D.N.Y., 1987), where the court found that rejection of a lease, "must result in the sublease being deemed rejected as well." And In Re: Elmhurst Transmission Corp., 60 B.R. 9, 10 (Bankr. E.D.N.Y., 1996) where the court found that subtenants do not have standing in the bankruptcy court after rejection of the Debtor's lease, they head lease, that is.

As discussed in the A&P case, the provision of section 365(d)(4) and 365(h) may seem to conflict with each other, but it is clear, given the language of 365(d)(4) requiring there be surrender as opposed to requiring displacement of any subtenant, that 365(d)(4) takes precedence over any obligation of the 365(h) to permit a subtenant to remain in place on a rejected lease.

The movant, or the landlord has cited a case from

Delaware, In Re: Amicus Wind Down Corp., 2012 Bankr. Lexis, 662 (Bankr. D. Del., February 24, 2012), for the contrary proposition. And it is true that in that case the bankruptcy judge required the debtor/tenant/sublandlord to bear the burden of evicting the subtenant as part of the rejection of the lease. However, in that case, as noted in the A&P, the lease rejection order required delivery of possession of the property to the head landlord, or the overlandlord, not merely surrender of the Debtors' interests in the property.

And moreover, I believe it's inconsistent with the case law in this district, which puts the burden on the overlandlord to obtain the removal of the subtenant after the Debtor has truly surrendered the property to the landlord. That's also appropriate because there may well be agreements between the landlord and the subtenant, or a course of dealing between the landlord and the subtenant that the Debtor may have nothing to do with.

And ultimately, because Congress gave the specific right to Debtor tenants to reject leases to avoid the ongoing cost of continuing to occupy the property. Clearly surrender is inconsistent with retaining any benefits from the sublease, but the Debtor here has represented that any payments made to it by the subtenant, the Winthrop Hospital, will be turned over to the landlord, which is appropriate.

I will, on that record, deny the limited objection and provide that the rejection will be effective as of the surrender on February 26th.

MS. ARTHUR: Thank you, Your Honor.

THE COURT: Okay.

MS. ARTHUR: The next, and then the last item on the agenda is the motion of Santa Rose Mall. I cede the podium to counsel.

THE COURT: Okay.

MS. COLON: Good morning, Your Honor. Sonia Colon for Santa Rosa Mall, LLC.

THE COURT: Good morning.

MR. CHICO-BORRIS: Good morning, Your Honor. On behalf of Santa Rosa Mall, I am Gustavo Chico.

THE COURT: Okay. Good morning.

MS. COLON: Judge, before we begin, we have copies of certain documents. Some of those documents were marked as confident. We have confirmed with Ms. Arthur, we're going to be producing a copy just to chambers and to her. We have admitted certain of the documents and I want to clarify why.

The first three documents were already produced on the record and attached to the motion. The second sets of the documents are the ones that are the confidentials that we are needing to record, which is 4, 5, 6 and 7. And the

other documents are dating six to four years before the Hurricane Maria. This is an insurance related to Hurricane Maria, if you need us to produce it, but it's not related to the contrary. In any event, they take, by reference, the lease agreement and incorporated therein, and the other documents were copies and it was a duplicate of the first three documents. But we have a copy for Your Honor --

THE COURT: Okay. And --

MS. COLON: -- if you need.

THE COURT: -- what are the ones you're handing up to me? What are those documents?

MS. COLON: This is -- and for the first three documents are certificates of insurance that were already submitted with Docket Number 2828. The next --

THE COURT: No, I'm just -- what are the new ones? I'm sorry I wasn't clear.

MS. COLON: The next four documents will make sense during the hearing because they refer to the contract of insurance upon which the Debtors' motion is based under opposition to our motion. And it says it also contains their claim to the insurance policy and certain agreements thereof, that they refer in their motion, that there was --

THE COURT: Okay.

MS. COLON: -- claims for Santa Rosa and there was an agreement for the claims for Santa Rose.

THE COURT: Okay. So do they include the insurance policy itself?

MS. COLON: Yes.

THE COURT: Okay. Fine. So you can hand those up. Because the Debtor has a copy?

MS. ARTHUR: I do not.

MS. COLON: Yes, I'll give her a copy right now.

THE COURT: Okay. You can just hand them to me. Thanks.

MS. COLON: With regards to the language of the insurance agreement, the inter-relationship of the insurance agreement and the agreement, we have briefed those on the record, Your Honor, but I'm going to leave my co-counsel, Gustavo Chico, to go into those because it involves a lot of insurance law. So he will be briefing the Court on those.

THE COURT: Okay.

MR. CHICO-BORRIS: Good morning, Your Honor. We have submitted motions at Docket 1240, the opposition is at 2512 and our response -- our response is at 2828.

THE COURT: Right. I will read those.

MR. CHICO-BORRIS: So, Your Honor, this is a shopping center in Puerto Rico. It was severely damaged by Hurricane Maria in September 20th, 2017. To give you a background on the shopping center, this is about a 500,000 square feet shopping center. Sears leased about 220 square

feet of that --

THE COURT: Two hundred and twenty thousand?

MR. CHICO-BORRIS: Two hundred-twenty thousand. Sorry. Of that mall. It's an anchor store. People go to that mal because of Sears. Two of the four main entrances to the mall are through Sears.

So in the lease agreement, back in 1965, the parties agreed how they were going to handle the insurance. Section 6.02(a) requires Sears to have -- to include, in any insurance policy, for windstorm, like Hurricane Maria, a loss/pay clause for the insurance. And it also required Sears to provide proof of insurance to the landlord. So we moved the court to declare that because Santa Rosa was supposed to be a loss payee under the insurance policy, it is a third party beneficiary. And so the insurance, the proceeds that would generally be part of the bankruptcy estate, because they were purchased for Santa Rosa, as the loss payee, bypass the bankruptcy estate and we moved the court to declare that those insurance proceeds, for Hurricane Maria damages, are not part of the bankruptcy estate.

Sears' contention, in its opposition at 2512, is essentially that they are part of the bankruptcy estate. And we find out, for the first time, that Santa Rosa was not included as a loss payee in the insurance policy, even

though we have submitted evidence to the court that for that particular insurance policy for that particular year that Hurricane Maria hit Puerto Rico, the certificate of insurance provided, expressly includes Santa Rosa as a loss payee.

So in our response, we briefed the Court that there are alternative ways of dealing with the fact that Sears, even if true, did not include Santa Rosa as a loss payee. The Court can reform the insurance policy or the Court may alternatively create an equitable lien over those funds.

But the importance and why we're pressing for those insurance proceeds is that the lease itself required these funds to be put into a separate account and the reason for that was, as detailed in section 6.03 of the lease agreement, is that Sears had the duty to expeditiously repair the damages. And if Sears did not expeditiously repair the damages then the landlord, with those separate funds that had to be allocated separately, may take over and repair, because inasmuch as Sears is not opened, it's still a tenant at that shopping center.

The traffic flow for people, the customers that go are decreasing significantly and, in addition, Sears is not paying percentage rent and, in addition, other tenants have co-tenancy clauses that are expressly dependent on

Sears' presence at the demised properties.

So, that's why timing and expeditiously repairing is essential in this lease agreement.

THE COURT: So, the issue is though, as I understand it, although I haven't gotten until just now, the insurance policy itself does not name the landlord as a loss payee or beneficiary, right?

MR. CHICO-BORRIS: Correct.

THE COURT: Okay.

MR. CHICO-BORRIS: The insurance policy is not attached to the -- it's not in the docket, but yes.

THE COURT: In fact, the motion actually sought to see it to determine their landlord's rights.

MR. CHICO-BORRIS: Right, but in addition to that we also moved the Court to consider the -- Sears requests the Court to only look at the insurance policy as determinative and we move the Court to not limit itself by the four corners of the insurance policy, but to the agreement leading up to the purchase of that insurance, which is essential and expressed in that Sears had to obtain a loss payee.

THE COURT: Right. But Sears' response is that's simply an agreement, like many agreements, that Sears has breached.

MR. CHICO-BORRIS: Even if breached, we contend

that the insurance proceeds... Right now Sears contends, but we don't know what's going to happen with that contract. It may be assumed or it may not, but as we stand here today we don't know that. If it's assumed it may be cured. If it's not -- even if it's not then still those funds have to be deposited and we move the Court to clear that because of the language in the lease agreement and because it was meant to be purchased with landlord as the loss payee, those funds should be declared not part of the bankruptcy estate and then given to Santa Rosa to fix the demised property.

THE COURT: On the basis of reformation or equitable lien.

MR. CHICO-BORRIS: We also -- if the Court reviews the insurance policy, we invite the Court to review the whole insurance, because there are provisions in the insurance policy that afford the correction of any mistakes.

THE COURT: What provisions?

MR. CHICO-BORRIS: Well, I don't want to get into the spec -- well, but if the Court takes a look at it.

MS. COLON: It's my understanding it's Section --

MR. CHICO-BORRIS: It's Section 37.

MS. COLON: 37.

MR. CHICO-BORRIS: Affords rights of reformation and corrections.

THE COURT: I'm sorry, so the insurance policy

itself is tab 4? I'm sorry, I'm just trying to make sure I understand which...

MS. COLON: The insurance policy is tab 4. That's the contract with the insurance.

THE COURT: But that's the errors and omission section, right, which goes to the insured's right of recovery.

MR. CHICO-BORRIS: Right.

THE COURT: That's not really a basis for reformation, right? Reformation is separate.

MR. CHICO-BORRIS: Right. What I'm proposing to -- what I mean with that section is that if Sears now claims that it made a mistake in not including Santa Rosa as a loss payee under the terms of the lease agreement for any reason, it may be corrected. That's my position. Sears may instruct the insurance company we made a mistake, this was supposed to be like this.

THE COURT: But Sears' position is that now that it's a Debtor-in-possession it owes a duty to all its creditors and can't do that voluntarily.

MR. CHICO-BORRIS: Yes, I believe so.

THE COURT: Okay.

MS. COLON: Another issue, Your Honor, Sears' position is that they're only -- that it is not included in the endorsement. In fact, there's only eight endorsements

in this policy and none covered any loss payees, any insurance for any landlords in the United States are covered in these eight endorsements, which is very limited in scope, which is surprising that nothing includes any landlord as a loss payee having represented landlords in the past.

So, there is language also that ARN will have each of the certificates. They are basing themselves in a specific language in the certificate of insurance that was provided to our client. Sears, pursuant to the lease agreement, was the one that provided those certificates of insurance to Santa Rosa and Santa Rosa relied on those certificates of insurance that it was covered year after year.

THE COURT: Are you saying that maybe there's some other rider or policy or something that would cover landlords and that's why ARN would provide the certificate?

MS. COLON: ARN is entitled to provide under the policy it's entitled to get --

THE COURT: Have you taken discovery yet?

MS. COLON: We tried to do subpoenas, Your Honor, on ARN directly and it's been very, very difficult.

THE COURT: And -- okay.

MS. COLON: The only documents that we have been able to provide is through Ms. (Indiscernible) and she has -- sorry, I couldn't find here -- and she has -- and through

subpoenas and discovery and these are the only documents that we have obtained so far and she has reached out to ARN.

THE COURT: Have you taken discovery of Sears yet?

MS. COLON: These are the documents that we obtained from Sears.

THE COURT: No, I know. But was that through a subpoena or did they just volunteer that?

MS. COLON: No, we had to subpoena them in the end because we had been trying to obtain the documents for some time.

THE COURT: All right. Okay, well I -- I haven't heard yet from Sears' counsel on this, but I had two reactions to this. The arguments that you're relying on at this point were raised because you didn't really have the documents on March 13th and there are new arguments. There's reformation and an equitable lien, which hasn't -- no one's had a chance to respond to that. And having earlier said that I believe Rule 7001 doesn't apply to a breach of the automatic stay action brought by a Debtor, you might think that I don't think highly of Rule 7001. But I think if you're actually seeking to impose an equitable lien or reform an agreement, you need to move by adversary proceeding because you're looking for a declaratory judgment.

In addition, you did actually have some time,

although this came in on the 13th, to research those two issues. Obviously this hasn't been briefed so I'm not going to rule on this today. I'm going to give the parties a chance to look at it. But, it would appear to me that under the law of Puerto Rico, which I think would be the controlling law here under New York Choice of Law Principles, because the injury happened in Puerto Rico.

MS. COLON: And the real estate is located there.

THE COURT: I'll give you a quote. The doctrine of equitable liens is not enforced in Puerto Rico. "In Puerto Rico, just as in the State of Louisiana, no legal existence is recognized to implied liens created by presumptions such as equitable liens", Rodriguez v. Solivellas & Co., 49 P.R.R. 618 (1936). See also (indiscernible) v. Superior Court, 96 P.R.R 246-249, P.R. 1968.

That's just what we found. Maybe you have other cases that would go to the contrary. And then the issue reformation requires mutual mistake. I think that would require an evidentiary hearing. You know, that's why I'm saying we need to have an adversary proceeding.

So, I don't think I'm in a position to rule on this today. As the Debtor said, it may become moot because this may be a store that ends up being assumed and assigned to the buyer in which case the contract, the lease would have to be cured, which would include performance. If

there's insurance to cover it, it's a valuable store, you might be arguing about nothing.

So, my inclination is to adjourn this so that the parties can develop the proper evidentiary record and for you to complete your discovery or Aon, for example.

MS. COLON: I understand as to that point, but one issue regarding the order which they (indiscernible) since there is a sale order and this may be precipitated. One item and that we stated when we reserved our rights during the sale motion. (Indiscernible) cannot sell something which is not yours. Those were the exact words.

And one important thing is that the order says that the buyer will cure before closing any monetary or undisputed or unmonetary undisputed cure costs. The fact is, even though we file a motion for how much the approximately cure costs were going forward, they have estimated it from $60 million to $30,000 and then...

THE COURT: Okay, but that's the type of thing you call can negotiate. In other words, that doesn't pertain to the insurance. Obviously, to assume the lease they've got to fix up the store and you've produced to me an insurance policy. There is an insurance policy that covers this store, so the insurer will be paying for it if they assume the lease.

MS. COLON: (indiscernible) information and belief

they already paid -- the insurance already paid.

THE COURT: Well --

MS. COLON: And those funds are separate. They should be used for the repairs of the store since we continue suffering damages on a daily basis.

THE COURT: That's if you win. I'm saying that -- look, I wasn't doing anything more than suggesting that, while I understand that your client wants the money now, one benefit, although it's not necessary to have this benefit because I don't think it's proceeding or teed up for a decision today anyway, but one benefit of carrying this so that a proper record can be established is that you will know whether the lease is to be assumed or not, in which case this becomes moot because the money is going to be used anyway no matter who wins to fix up the store.

MS. COLON: The second consideration, the other consideration is that once that appears on April 12, if it happens, there have the estimation instead it will take six months or seven months to repair the store and after losing 574 days the store going dark, we lose six more months or seven months in --

THE COURT: Well, that would happen if you got the money today anyway, right? It takes that long to fix it up no matter who is fixing it up.

MS. COLON: We'll start right away. We'll try to

start.

THE COURT: I'm assuming they would too because they want to open it up and sell to, you know, sell tools and clothes and stuff.

MS. COLON: That's not the situation. We want to stop the damage that is happened to the mall at large.

THE COURT: Okay.

MS. COLON: Okay.

THE COURT: But it's a mall that has an empty store in it and it's not assumed so it doesn't really -- to me it's not very practical to say that it'll take six months because it probably would take six months anyway and you would have a tenant. Okay.

MS. ARTHUR: Thank you, Your Honor. We're okay, of course, with the adjournment. I would just like to note though for purposes of teeing up the equitable lien and reformation issues that were raised in the reply, would that be taking the position that the proceeds of the insurance policy, those proceeds are in fact property of the Debtor's estate? I would assume given the arguments that --

THE COURT: That's what I assume, subject to reformation, in which case they wouldn't be. But something has to happen before they're taken out of the estate.

MS. ARTHUR: I believe that's the last item on the agenda, Your Honor.

THE COURT: Okay, so what I'd like is for the lawyers to discuss the schedule for this and that would include a discovery schedule and probably I would need a separate day, as opposed to an omnibus day, to have a trial on it. Although you may be able to reduce the issues. If the citations I gave you are still binding, then it would only be -- it would be on equitable lien, it would just be on reformation, for example.

But they are discreet bankruptcy issues pertaining to the reformation obviously, which haven't been briefed at all yet. So, I think you ought to discuss the timing of this, whether either side contemplates some form of dispositive motion first on those two potential causes of action or whether you want to go right to a trial. Thank you.

(Whereupon these proceedings were concluded at 12:19 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: March 22, 2019